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No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, ET AL.,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, ET AL.,

Respondents.

On Writ of Certiorari
to the Supreme Court of Connecticut

BRIEF OF *AMICI CURIAE* AMERICA'S FUTURE INC. AND SOMERSET TRANSMISSION & REPAIR CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

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INTEREST OF *AMICI CURIAE*[1]

America's Future Inc. (AF) is a nonprofit educational organization founded in 1946. Its mission includes the preservation of our free enterprise system and our constitutional form of government. For 58 years it has supported our Republic in protection of economic freedom and capitalism. Towards these goals, AF has defended the constitutional safeguards for private property. AF has consistently main-

[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than the *amici curiae*, their employees or members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the timely filing of all *amicus curiae* briefs in this matter and copies of their letters of consent have been lodged with the Clerk of the Court.

tained that the Constitution is the most profoundly important instrument ever devised by man for the protection of freedom, and it must be preserved against erosion caused by overreaching governmental policies. AF distributes a newsletter and radio program in furtherance of these objectives. *Amicus* AF has a direct and vital interest in the issues presented to this Court based on its active participation in promoting economic freedom for nearly sixty years.

Amicus Somerset Transmission & Repair Center is a sole proprietorship that has operated since 1978 at 591 Somerset Street in Franklin Township, New Jersey. At that time this small business stepped into a decrepit building featuring broken windows and a lack of functioning heat. The structure's block walls were cracked horizontally throughout, and its beams had sagged and were pulling the walls inward. Plastic sheets hung from the ceiling to catch leaking rainwater. Though an eyesore to the community, it presented an opportunity to a nineteen-year-old aspiring mechanic named Court Throckmorton. With his older sister co-signing on a loan, he acquired the property in order to develop it into his own business. Mr. Throckmorton proceeded to rebuild the facility and develop his service business, and in the subsequent 26 years employed a dozen or so workers. He taught his employees the skills to run a business, many of whom went on to successfully operate small businesses of their own. In one example, Mr. Throckmorton charitably took in a disaffected sixteen year-old as an employee, picking him up at 6:30 am each day; now that former employee successfully manages a car dealership. In contrast to Fortune 500 corporations, Somerset Transmission & Repair Center has never laid off an employee, and no employee has ever quit in anger.

Since September 1999, *Amicus* Somerset Transmission & Repair Center has faced a possible eminent domain action to take its property for the benefit of a new business. This planned condemnation has disrupted Mr. Throckmorton's future plans for his business and interfered with investment in it. *Amicus* Somerset Transmission & Repair Center has a direct and vital interest in the action at bar due to its likely impact on the eminent domain threatened against it.

SUMMARY OF ARGUMENT

"Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). This "essential principle," *id.*, enjoys its fullest protection in the Fifth Amendment requirement limiting governmental takings to "public use." Simply put, the Constitution prohibits taking private property from one business to give to another. The free market is far better suited to allocating scarce resources to their most efficient uses than government is. But whether efficient or not, the Fifth Amendment flatly protects businesses and individuals against the infringement at bar on the rights of private property. The Constitution plainly does not allow municipalities to take property from one for the benefit of another.

Yet municipalities nationwide are attempting to bypass the "public use" requirement of eminent domain, and are snuffing out a lifetime of effort by thousands of small businessmen, including *Amicus* Somerset Transmission & Repair Center. Small businesses plant their roots in communities based on personal relationships with their customers, and forced relocations disrupt and destroy those ties that bind. The small businesses are the ones that create the vast majority of jobs and also sponsor the countless local causes that cry out for support, ranging from the Boys and Girls Club and Little League sports teams for youths to the fundraising drives to pay medical costs for a particularly sick neighbor. The destruction of these small businesses simply to transfer their property to other businesses is as wasteful as it is unconstitutional.

In these governmental takings, the condemned business owner can typically claim only an appraised value for the hol-

low building and land that he actually owns, receiving $0 for the goodwill and revenue stream from customers he has nourished over the years. A business leasing its property usually receives no compensation, and the employees get nothing. The denigration of "public use" to mean almost anything, including unproven claims of increasing tax revenue, is contrary to the plain meaning of the Fifth Amendment and numerous precedents of this Court.

It was unconstitutional for the court below to authorize the town of New London to take the properties of Susette Kelo and many others for the benefit of a private companies that could include the wealthy pharmaceutical corporation Pfizer Inc. Manufacturing Viagra surely is not the "public use" that our Founders had in mind when they wrote eminent domain into the Constitution. With the exception of protecting the health and safety of its citizens, government has no legitimate interest in taking property from one business to give to another. It is not a proper governmental function to be robbing from Peter to give his land to Paul.

"The greatest evil is not done now in those sordid 'dens of crime' that Dickens loved to paint … [but] in clear, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice." C.S. Lewis, *The Screwtape Letters* 6 (rev. ed. 1982). This observation by C.S. Lewis is particularly apropos to the taking of the property of small businesses to hand over to other businesses. The Fifth Amendment forbids this growing, pernicious practice, and it is long overdue to enforce the Fifth Amendment by reversing the decision below.

ARGUMENT

I. PRIVATE PROPERTY RIGHTS, AS SECURED BY THE FIFTH AMENDMENT, MUST WITHSTAND THE TAKING FROM ONE BUSINESS TO GIVE TO ANOTHER.

Taking property from one business to give to another is not a "public use" within the meaning of the Fifth Amendment. U.S. Const. amend. V (mandating that property may not be "taken for **public use,** without just compensation") (emphasis added). Government has neither the power nor the expertise to prefer one business over another, except perhaps in areas of health, safety or morals not at issue here. The right of private property, if it is to have any meaning at all, surely includes the right of a longstanding sole proprietorship such as *Amicus* Somerset Transmission & Repair Center to withstand seizure of its location to hand it over to another business.

As Justice Harlan restated in his prescient dissent in *Plessy v. Ferguson*:

> "Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. **The right of eminent domain nowhere justifies taking property for a private use.**"

163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (quoting *Olcott v. The Supervisors*, 16 Wall. 678, 694 (1873), emphasis added). The decision below contravenes this basic principle, and must be reversed.

"It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). There

this Court found a lack of the requisite "public use" in the excessive widening of a street proposed by the City of Cincinnati. Specifically, the City sought to resell land excessively taken in order to fund the expense of the necessary street widening. "[T]he excess condemnation was in violation of the constitutional rights of the plaintiffs upon the ground that it was not a taking for a public use within the meaning of that term as it heretofore has been held to justify the taking of private property." *Id.* at 444 (quotations omitted).

This Court expressly affirmed the principle that taking private property "for the purpose of selling it at a profit and paying for the improvement ... is clearly invalid." *Id.* (quotations omitted). While this Court ultimately rested its decision on a failure by the City to "strictly follow[]" its requirements to justify the excessive condemnation, the holding leaves little doubt that "public use" does not extend to financial needs of government. *Id.* at 448 ("[T]he power conferred upon a municipal corporation to take private property for public use must be strictly followed.").

The *Cincinnati* ruling and its precedential authority have been consistently affirmed. "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). Where the essential "public use" is lacking, the taking of one by government to give to another must be rejected. *See Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896) (invalidating a taking due to a lack of public use). "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Id.* at 417. *See also Madison-*

ville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251-52 (1905) ("It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, **grows out of the essential nature of all free governments**.") (emphasis added).

The rulings of *Missouri Pacific R. Co.* and *Cincinnati*, and their progeny, prohibit the taking from one business to give to another as sought here by the City of New London, Connecticut, against condemnees that include investment properties. *Missouri Pacific R. Co.* rejected a taking from a private railroad company for the benefit of another business seeking to build an additional grain elevator at a railway station. In words applicable here, this Court rejected such condemnation as "a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit." 164 U.S. at 416. *See also Consolidated Gas Corp.*, 300 U.S. at 80. It was reversible error for the court below to embrace an academic view that "'the term 'public use' as used in the Fifth Amendment was meant to be descriptive, rather than proscriptive.'" *Kelo v. New London*, 268 Conn. 1, 54 n.49 (2004) (quoting Matthew P. Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 53 Hastings L.J. 1245, 1249 (2002)).

The private beneficiaries of the taking at bar are profit-maximizing entities. They remain free to make purchases of real property on the open market just as any other company can. But the Constitution does not permit forced transfer from small businesses, such as rental apartments, to private beneficiaries. Even though government asserts a financial benefit for itself from this compelled transaction, such windfall does not satisfy the requirements of the Fifth Amendment. In *Cincinnati*, this Court implicitly rejected alleged financial

benefit to a municipality as a legitimate "public use." *See* 281 U.S. at 443 ("In what way the excess condemnation of these properties was in furtherance of the widening of the street, and why it was necessary for the complete enjoyment and preservation of the public use of the widened street are not stated and are thus left to surmise.").

This Court did not hold otherwise in *Ruckelshaus v. Monsanto Co.*, where business intellectual property was taken for public and potentially private benefit within a statutory framework that provided full remedy for all business loss to the condemnee. 467 U.S. 986, 1019 (1984) ("Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of [federal law], we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution."). In contrast, such remedy for lost business is utterly lacking in most eminent domain actions.

The aberrational ruling of this Court in favor of taking real property from one to give to another in *Berman v. Parker* is readily distinguishable from the action at bar. 348 U.S. 26 (1954). In *Berman*, this Court upheld a taking of a slum but justified it based on bona fide interests in "[p]ublic safety, public health, morality, peace and quiet, law and order." *Id.* at 32. The unquenchable thirst for taxes presented here was not one of the acceptable rationales. Increasing tax revenues and allegedly promoting economic development are not legitimate reasons for taking from one party to give to another. In contrast, the *Berman* ruling relied on its observation that:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Id. at 32-33. Nothing of the sort justifies the taking at issue here. *See also Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923) (approving eminent domain for two highways having an obvious "public use," in contrast to the private benefit contemplated here).

"To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain." *County of Wayne v. Hathcock*, 471 Mich. 445, 482 (2004). There the Supreme Court of Michigan properly overturned its own precedent in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616 (1981), which had unleashed eminent domain actions nationwide to take property from one private entity to give to another without satisfying the traditional "public use" limitation. The notorious *Poletown* ruling authorized the demolition of hundreds of businesses, more than a thousand homes, and even several churches in a Polish community near Detroit in order to build a new General Motors plant. In July the Michigan Supreme Court repudiated that ruling and returned to the original intent of the "public use" limitation, declaring the *Poletown* decision to be a "radical departure from fundamental constitutional principles." *County of Wayne*, 471 Mich. at 483. "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Id.* at 468.

The decision below relied heavily on the now-discredited *Poletown* decision, twice heralding it as a "landmark case." 268 Conn. at 41, 45 n.39. The court below even insisted on going beyond the *Poletown* ruling, eschewing its heightened scrutiny of takings for private use. "Indeed, we conclude that the application of a 'heightened scrutiny' standard [of *Pole-*

town] is inconsistent with our well established approach of deference to legislative determinations of public use." *Id.* at 45 n.39 (citation omitted). The dissent below foreshadowed the subsequent overturning of *Poletown* by declaring that "the majority reaches the wrong result with respect to the plaintiffs' properties, in part because it overlooks the fact that private economic development differs in many important respects from how we previously have defined a public use." *Id.* at 122 (Zarella, J., dissenting).

Without the "public use" limitation, there is every incentive for factions with political clout to exploit defenseless minorities lacking political clout. This is precisely the sort of economic factionalism and majority domination that James Madison sought to prevent:

> Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations: But on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism.

James Madison, Replies to Patrick Henry, Defending the Taxing Power and Explaining Federalism (Virginia Convention, June 6, 1788), in 2 *The Debate on the Constitution* 611, 612 (Bernard Bailyn ed., The Library of America 1993). *See generally* Derek Werner, "The Public Use Clause, Common Sense and Takings," B.U. Pub. Int. L.J. 335, 346-48 (2001) (describing how the majorities buddy up with government officials to make political deals to expand "public use").

The right to own private property, without the fear of having it taken for another private entity, is essential in a free nation. The scope of "public use" must be limited to its plain meaning, such as the construction of municipal buildings,

highways or public parks. There is no end to the mischief in redefining "public purpose" by economic factions manipulating the political process, and the Fifth Amendment safeguards against such invasion of economic rights.

II. THE FIFTH AMENDMENT PROTECTS SMALL BUSINESSES AGAINST ECONOMIC LOSS IN TAKINGS FOR ECONOMIC DEVELOPMENT.

This Court recently affirmed that the Fifth Amendment applies to protect income against complete takings by government. *See Brown v. Legal Found.*, 538 U.S. 216 (2003). There this Court was unanimous in holding that a "law that requires that the interest on [client] funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client." *Id.* at 240. At issue in *Brown* was the constitutionality of a Washington law requiring attorneys to deposit client trust funds in a common account for the benefit of a legal aid program if the individual interest amounts to less than individual administrative costs. Though this Court split 5-4 against compensating the client for the taken interest based on the likely excess of administrative costs over income, all Justices agreed that seizure of this interest did constitute a taking for purposes of the Fifth Amendment.

A similar taking occurs when a business owner is deprived of all of his income derived from his property in order to transfer the land to another in a condemnation proceeding. In such an exercise of eminent domain, revenue is effectively transferred by force from one property owner to another, who then exploits the property for his own business purposes. This is indistinguishable from the taking of interest from one client to assist a poorer one pursuant to the legal aid program reviewed in the *Brown* case. Under the reasoning embraced in *Brown*, this is a taking protected by the Fifth Amendment and the original business owner should be entitled to compensation for his lost income.

In the case at bar, one plaintiff is being deprived of his business property of seventeen years, while another is losing his business property of eight years:

> [T]wo of the plaintiffs own their property as business investments--the rental of apartments. These two people have put much time, money and effort into renovating their properties, one has owned his property for seventeen years, the other for about eight years.

268 Conn. at 11.

It is no consolation to the condemnee that his lost income is not directly realized by the transferee business. Like *Amicus* Somerset Transmission & Repair Center, the original business may have garnered income from fixing automobile transmissions while the transferee business may be a massive Home Depot store that sells building materials. This Court has been clear, even unanimous, in declaring that the "just compensation" in such scenario "is measured by the owner's pecuniary loss," not by the transferee's gain. *Brown*, 538 U.S. at 240. "Most frequently cited is Justice Holmes' characteristically terse statement that 'the question is what has the owner lost, not what has the taker gained.'" *Id.* at 236 (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)). The owner is clearly "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934). *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (noting the duty of the public to compensate an owner for "his unique need for property or idiosyncratic attachment to it"); *id.* at 23 (Douglas, J., dissenting) (the government's obligation is "not for what it gets but for what the owner loses").

The goodwill developed by a small businessman over years, and often decades, is partially or completely lost in a taking. It is not reflected in the appraised value of the property. The Fifth Amendment should be construed to ensure

that takings compensate the owner for his loss, not what was gained by the new business. Full application of the Fifth Amendment would render many of these takings for economic development unattractive by imposing the real economic costs of the condemnation on the acquirers. It is only by avoiding payment for these real economic losses that these abusive condemnations for private benefit have flourished nationwide.

The difficulties in measuring the lost revenue to the small businessman are no greater than the obstacles in obtaining an accurate appraisal of the real property itself. Both are based on future expectations of earnings, and the market prices for the property interests. Experts are widely available to provide estimates. Both lost revenue and lost land value depend equally on anticipated future usage and demand. Moreover, this Court's decision in *Brown* implicitly rejected any distinction between taking income already earned and future income. This Court deemed it a taking to deprive clients of future interest income by depositing their funds into commingled accounts before any such interest could be earned.

Adherence to the principle of full compensation to businesses for takings has worked for nearly thirty years in the State of California, which has awarded lost goodwill to businesses in condemnation proceedings. *See, e.g., Community Development Com. v. Asaro*, 212 Cal. App. 3d 1297, 1301-02 (4th App. Dist. 1989) ("In 1975, the Legislature enacted a comprehensive revision of California's eminent domain law, which, among other things, authorizes compensation for the loss of business goodwill."). When Dr. George H. Muller's veterinary hospital of nearly 30 years was condemned by the California Department of Transportation, forcing him to relocate his business, he successfully sued for an award of $96,000 in lost goodwill. *See People ex rel. Department of Transportation v. Muller*, 36 Cal. 3d 263 (1984). Similarly, in *Redevelopment Agency v. Thrifty Oil Co.*, the California Court of Appeals ruled that the defendant was entitled to

$67,500 for the loss of goodwill when the government acquired his property through eminent domain action. 4 Cal. App. 4th 469, 475 n.10 (1992) (compensable goodwill "'consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage'") (quoting California Code of Civil Procedure § 1263.510(b)).

A few other states have also recognized the need to compensate an owner for the loss of business inherent in a taking. Condemnations in Michigan, Minnesota and Pennsylvania sometimes do allow compensation for the "going concern" value of the taken business, at least where relocation is not possible. *See, e.g., Lansing v. Wery*, 68 Mich. App. 158 (1976) (affirming inclusion of the value of a going concern in a condemnation award in favor of a 50-year-old restaurant); *State v. Saugen*, 283 Minn. 402 (1969) (holding that the going concern value was part of the property right taken by the condemnor); *Redevelopment Authority of Philadelphia v. Lieberman*, 461 Pa. 208 (1975) ("As early as 1909, this Court held that the value of a condemned waterworks property was to be determined by considering the physical property as a going concern; to do so the value of intangibles such as a franchise, market price of stock, and income based on reasonable tolls were to be considered.") (citing *Kimball Laundry Co., supra*, emphasis omitted).

But most states deny such compensation, thereby leading to rampant takings of property from one business to give to another. For example, compensation for goodwill in the takings of business is denied in Arkansas, Kentucky, Texas, Wyoming and Utah. *See Arkansas State Highway Commission v Highfill*, 248 Ark. 541, 452 S.W.2d 846 (1970); *Arkansas State Highway Commission v Wallace*, 247 Ark. 157, 444 S.W.2d 685 (1969); *Dept. of Highways v. Silver*, 487 S.W.2d 926 (Ct. App. Ky. 1972); *Huckabee v. State*, 431 S.W.2d 927 (Tex. Civ. App. Beaumont 1968); *State v. Zaruba*, 418

S.W.2d 499 (Tex. 1967); *State v. Ouzounian*, 26 Utah 2d 442, 491 P.2d 1093 (1971); *State Highway Commissioner v. Peters*, 416 P.2d 390, 396 (Wyo. 1966). In Connecticut, the value of the business is not compensable except to the extent it is reflected in the value of the property itself. *See Housing Authority of City of Bridgeport v. Lustig*, 139 Conn. 73, 76-77, 90 A.2d 169 (1952). A taking of the property of *Amicus* Somerset Transmissions and Repair Center would cause it an economic loss for its variances for automotive sales and inspections, which cannot be relocated.

Clarification of the small business owner's right to full recovery in a condemnation proceeding is overdue. This Court has previously left this issue unresolved. "The special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain. Doubtless such special value of the plaintiffs' land was duly considered by the President in fixing the amount to be paid therefor." *Mitchell v. United States*, 267 U.S. 341, 344-45 (1925) (citations omitted). *But see id.* at 345 ("The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction.").

If taking from one business to give to another qualifies as "public use," then the Fifth Amendment requires full compensation for economic loss by the condemned business. Affirming this requirement alone would end most of the abusive takings of one business to give to another.

III. TAKING THE PROPERTY OF SMALL BUSINESSES FOR PRIVATE DEVELOPMENT IS ARBITRARY, IRRATIONAL AND ECONOMICALLY WASTEFUL.

The epitome of arbitrary government action is when it forcibly replaces one business with another. Government cannot properly feed more and more small businesses to giant corporations as though they all constituted an economic food chain, with a view that bigger is better. Increasing taxes by encouraging large over small corporations is not a legal justification for government to rob from the latter to give to the former. The progressive system of taxation has a built-in incentive for government to prefer big business over small business, but that bias does not create a rational basis for destroying small businesses by taking their property to hand over to larger ones. Aside from protecting the health and safety of its citizens, government has no legitimate interest in taking land from one business to give it to another.

Economic studies show that small businesses are far more effective at creating jobs than large counterparts. Small businesses annually create 60 to 80 percent of all new jobs in the United States, and employ at least half of all private sector workers. "SEC Tells Congress It Hopes to Minimize Sarbanes-Oxley Impact on Small Business," FinancialWire, Sept. 27, 2004. But the creation of these jobs requires investment in small business, in order to increase the customer base and goodwill. If the government can close down a business at any time for the benefit of another business, then this arbitrariness deters badly needed investment. When summed up with respect to the many small businesses affected by an eminent domain for development purposes, the lost investment in job creation is enormous. "Nationally, between twenty-five and forty percent of businesses forced to relocate by renewal projects fail." John P. Elwood, "Focus on: Urban America: Rethinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven," 12 Yale L. &

Pol'y Rev. 138, 180 (1994). *Amicus* Somerset Transmission & Repair Center has suffered the threat of a condemnation for over a year, as have many businesses in its area and hundreds of thousands of small businesses nationwide.

Often the condemnations are announced long before they are realized, apparently with the purpose of deterring investment in order to depress the property value to be paid to the condemnee. In the eminent domain threatening *Amicus* Somerset Transmission & Repair Center, the town announced an enormous redevelopment plan years before it could even be possible to execute, thereby reducing as much as possible what the town will ultimately have to pay. The former mayor of Franklin Township declared that one intent of the redevelopment plan was to discourage speculators from buying and improving the properties in the redevelopment area and thus increasing the cost of those properties should the Township need to acquire them through eminent domain. Franklin Township Public Hearing Minutes ¶ 9, Nov. 26, 2002. The decision below implicitly allows this type of value-depressing delay, and must be reversed. 268 Conn. at 119-20 (allowing "a town's condemnation [despite] the town's lack of a detailed plan designating exactly what part of the defendants' land it needed for what purpose" and approving it without "a development commitment or formal site plan in place for parcel").

In the context of eminent domain for private development, the distorting incentives for economically harmful behavior are magnified. Specifically, there is a "rent-seeking" incentive that magnifies the overall waste and injustice. "[A] resource's value after condemnation is almost always higher than before [and t]he present compensation formula allocates 100% of this surplus to the condemnor, and none to the condemnee." Thomas W. Merrill, "The Economics of Public Use," 72 Cornell L. Rev. 61, 85 (1986). When the use is truly for the public, that surplus inures to the benefit of all. Moreover, the limitation of "public use" serves to minimize the

occurrence of this disruption: a town can only build a small number of municipal buildings or power plants. But when the door is opened to takings for private purposes, rent-seeking behavior incites an unlimited number of attempts to capture that surplus. The private beneficiaries of the takings have every incentive to lobby for as much as they possibly can.

The surplus, however, comes at the uncompensated expense of the small business being condemned. The years leading up to the condemnation extract further costs in lost investment. Is government endowed with the power and wisdom to choose one business over another for economic reasons? Certainly not. The Fifth Amendment prohibits this rent-seeking behavior in destroying one business for the benefit of another. When the constitutional protection is unenforced, however, towns have every incentive to increase the economic rent and share it with the developer benefiting from the taking. This economic rent is maximized by scaring away as much investment as possible from the condemnees, typically by publicizing the eminent domain as early and frequently as possible. That depresses property values, scares away improvements, and lowers the appraised value, thereby reducing the price the town eventually pays.

The familiar argument that eminent domain for private development is somehow necessary for slum clearance or blighted areas is unsupported. For starters, neither this case nor most uses of eminent domain today concern truly blighted areas. And even when areas are blighted, free enterprise is the answer rather than eminent domain. For example, in Olivette, Missouri, the developer made generous offers funded by tax rebates to acquire 150 old homes near a freeway, in order to make way for "big box" retailers including Wal-Mart and Home Depot. A premium of up to 2.5 times market value was negotiated, but for truly blighted areas such markups are modest relative to the contemplated gain. After all, blighted property is by definition worth very little. This project ultimately failed not due to any obstacles in acquiring the property, but because neighbors opposed to the increased traffic flow narrowly voted it down. George Lefcoe, "Finding the Blight That's Right for California Redevelopment," 52 Hastings L.J. 991, 1028-30 (2001). Successful examples of free market-based city planning abound, such as Columbia, Maryland, an entire city of 90,000 developed by one planner without eminent domain. As to alleged problems of clouds over titles, they can be addressed by state property laws other than unlimited eminent domain, such as requiring owners to assert their rights within a certain time period to avoid condemnation. If blighted properties were so prevalent, then developers could target multiple sites and bargain with different groups of property owners to solve the obstacle of the holdout. The solution is for the state to facilitate the free market, not frustrate it.

Arbitrary governmental interference with private property, typified by taking from one business to give to another, is loathsome to the efficient operation of free enterprise. The Nobel-prize winning Coase Theorem teaches that market efficiency will occur regardless of how legal entitlements are drawn, but they must be drawn somewhere lest economic activity dry up amid the uncertainty:

> As Ronald H. Coase has reminded us … 'uncertainty about the legal position itself' must be taken into account. The underlying rationale for the stated concern is that a society needs a system of law (including natural resource and environmental law) that provides them a stable pattern of expectations. So structured, this allows people to plan their economic affairs with reasonable confidence so that they can know in advance the consequences of their choices.

Nicholas Mercuro and Michael D. Kaplowitz, "Performance Indicators for Natural Resource and Environmental Policy: Contributions from American Institutional Law and Economics," 11 Duke Env L & Pol'y J 139 (Fall 2000) (quoting Ronald H. Coase, "The Problem of Social Cost," 3 J.L. &

Econ. 1, 19 (1960)). The specter of condemnation for private uses thoroughly disrupts "a stable pattern of expectations" essential to efficient bargaining and investment. Economic activity is greatly hindered by the growing practice of governmental taking from one business to give to another.

The most "blighted" sight of all is a huge retail store that is vacant and inevitably vandalized. A collection of small businesses is much better suited to handling the economic cycles and competitive upheavals than are their lumbering counterparts. The real property of a small business that goes bankrupt can be easily adapted to many other types of businesses. But what is to be done with the buildings left behind with the massive bankruptcies and downsizings of Fortune 500 companies? All too often, they become inefficient eyesores that scar the landscape long afterwards. For example, after K-Mart opened over 2,000 box-like stores, it subsequently collapsed financially. It then proceeded to close about 600 of its stores, blighting the landscape and leaving local communities helpless to pick up the slack. Sridhar Krishnaswami, "K-Mart to Merge with Sears, Roebuck & Co.," Business Line, Nov. 18, 2004. K-Mart laid off 55,000 employees in the process, leaving most without the skills necessary to survive by starting their own business. *Id.* Small businesses and their employees are far more resilient in handling economic downturns or shifts in buying tastes than "mega stores" surrounded by enormous parking lots.

Finally, it is worth debunking the unsupported claim that replacing small businesses with "big box" retailers, or with a corporate complex in this case, is somehow good public policy. All indications are to the contrary. Small businesses are essential to supporting the youth sports teams, the adult softball and bowling leagues, the local fire departments, the Kiwanis and Lions clubs, and all the sundry local charitable events that bind a community together. In a seminal work, Professor Robert Putnam demonstrated that a rise in social ills is correlated to a decline in these community activities.

Robert D. Putnam, *Bowling Alone: the Collapse and Revival of Community* (2000). It surely is not good policy forcibly to rip out the engine that drives these essential aspects of a productive community: small business.

The replacement of small businesses with the big boxes has a devastating effect on local charities. For example, the large retailer Target has banned the local Salvation Army chapters from soliciting donations outside its doors, a decision expected to cost charities in Broward and Palm Beach counties $70,000 each. Karla D. Shores, "Target Halts Holiday Soliciting; Decision Pulls Key Location for Salvation Army," Sun-Sentinel (Fort Lauderdale, Florida), Nov. 10, 2004. This contrasts sharply with local businesses that generously donate to the community. A Wal-Mart store in Ohio, which probably displaced a hundred small businesses, expressed its support of the local community with a paltry check of only $680 to its single selected charity, a hospice. "Xenia Wal-Mart Gives $680 Check to Dayton Hospice," Dayton Daily News, Z4-8, Jan. 2, 2003. While disdain for community activities is surely within the rights of large retailers, it is also within the Fifth Amendment rights of small businesses to say "no" to the taking of their property for the benefit of out-of-state corporations.

CONCLUSION

The decision below should be reversed.

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